No. 447.

Supreme Court of the United States

OCTOBER TERM, 1948

WHEELING STEEL CORPORATION,
Appellant,

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion delivered by the Supreme Court of Ohio in this case (R. 16) is reported officially in Volume 150, Ohio State Reports, beginning at page 229 (Ohio Bar, August 9, 1948). The opinion of the Board of Tax Appeals of Ohio (R. 67) is reported unofficially in Volume 72, Northeastern Reporter, Second Series, beginning at page 592. The opinion of the Tax Commissioner of Ohio (R. 57) is not reported.

STATEMENT OF JURISDICTION

This case was heard and decided by the Supreme Court of Ohio on an appeal from a final order of the Board of Tax Appeals of Ohio affirming assessment by the state Tax Commissioner [1] of an ad valorem tax in respect of certain promissory notes and accounts receivable belonging to appellant, Wheeling Steel Corporation, a Delaware corporation having its principal office and commercial domicile in West Virginia [2] and authorized to do business in Ohio. At every stage of the proceedings, before the Commissioner (R. 57), before the Board (R. 35) and before the Court (R. 15), appellant drew in question the validity of Sections 5328-1 and 5328-2 [3] of the General Code of Ohio, which purport to authorize the assessment, on the ground that, as interpreted and applied, they are repugnant to the Constitution of the United States. Both the Commissioner (R. 58) and the Board (R. 71) refused to consider the question of the validity of the statutes, saying they were without authority to declare statutes unconstitutional; the Court decided in favor of their validity (R. 25). In its notice of appeal to the Supreme Court of Ohio (R. 8) the highest court of the state in which a decision could be had, appellant assigned as grounds for reversal of the decision of the Board of Tax Appeals that the statutes in question, as construed and applied by the Commissioner and the Board, burden and obstruct interstate commerce, deprive appellant of its property without due

1. C. Emory Glander, Tax Commissioner of Ohio, is the appellee and is referred to in this brief as the "Commissioner".

2. See Wheeling Steel Corp. vs. Fox, 298 U. S. 193.

3. The pertinent parts of these and other Ohio statutes mentioned in this brief appear in the appendix, beginning at page 30.

process of law and deny it the equal protection of the laws (R. 15). A determination of the constitutional questions thus raised by appellant was necessary to the decision of the case and the Ohio Supreme Court considered these questions and decided that the statutes are valid and are not repugnant to the Constitution of the United States (R. 25).

The judgment of that Court was entered on August 4, 1948 and became final on October 6, 1948 upon the overruling of an application for rehearing filed by appellant on August 17, 1948 (R. 7). An appeal to this Court was allowed by Honorable Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio, on November 1, 1948 (R. 3).

Jurisdiction of this Court is invoked under favor of Title 28, United States Code, Section 1257 (Pub. L. No. 773, 80th Cong., 2d Sess.).

STATEMENT OF THE CASE

The Legal Issues

The question is, may the state of Ohio collect from appellant, a foreign corporation authorized to do business within its borders, an ad valorem tax in respect of notes and accounts receivable (a) whose only link with Ohio is the fact that they can be traced back to sales of products delivered from appellant's manufacturing plants in Ohio, and (b) notwithstanding that

(1) the sales giving rise to the receivables resulted in the main [4] from purchase orders placed by customers at sales offices maintained by appellant in 12 states,[5]

4. Some purchase orders were sent directly by the purchasers to appellant's principal office in Wheeling, West Virginia.

5. Georgia, New York, Ohio, Michigan, Louisiana, Pennsylvania, California, Massachusetts, Illinois, Texas, Missouri, and Washington.

which were forwarded by mail from the originating sales offices to the principal office in Wheeling, West Virginia;

(2) the purchase orders in every instance were subject to acceptance and were in fact accepted at the principal office in Wheeling;

(3) the notes and other documents evidencing the receivables were at all times kept in Wheeling and were at all times under the control of appellant's treasurer in that city;

(4) the receivables in every instance were payable at Wheeling and were there paid;

(5) the proceeds of the receivables, when paid, were under the supervision and control of appellant's treasurer in Wheeling and were there drawn upon for the general purposes of the business;

(6) the identical receivables would not be taxable if appellant were an Ohio corporation, the Ohio Supreme Court having held that intangibles of the same sort arising, held and used in precisely the same manner are exempt if they belong to a domestic corporation,[6] taxable if they belong to a foreign corporation.

Appellant contends:

(1) that Ohio has no jurisdiction to tax these intangibles and that its attempt to do so contravenes the due process clause of the Fourteenth Amendment (see pp. 10-17 of this brief);

(2) that the attempted exaction is void under the Commerce Clause because it would subject appellant to a multiple property-tax burden since (a) the receivables are already subject to ad valorem taxation in both Delaware and West Virginia, appellant's legal and commercial domiciles respectively, and (b) if Ohio has authority

6. Ransom & Randolph Co. vs. Evatt, 142 O. S. 398 (1944).

to tax, no reason appears why the state of origination of an order should not likewise have authority, thus increasing to four the number of states permitted to tax the proceeds of a single sale, that is, the state of origination of the order, the state of acceptance of the order, the state supplying the goods to fill the order and the state of incorporation (see pp. 17-20 of this brief);

(3) that the attempted exaction denies appellant the equal protection of the laws, because it discriminates against appellant and in favor of similar local enterprises since the very same receivables arising, held and used in the very same fashion would be exempt from property taxation if they belonged to an Ohio corporation, and are singled out for assessment only because appellant is a foreign corporation (see pp. 20-27 of this brief).

The Agreed Facts

There is no issue as to the facts of the case, all of which were stipulated[7] by counsel for the parties. In essence they are that at the times mentioned in the stipulation, appellant was a Delaware corporation engaged in the business of manufacturing and selling steel and steel products. Its general offices were located in Wheeling, West Virginia where all of its officers had their offices, meetings of its board of directors were held and the records of its business were kept. Custody and control of its money, notes, securities and other valuable effects were exercised by the corporation's treasurer, whose office was in Wheeling, and all commercial and other accounts payable were paid by checks signed and issued

7. The full stipulation of facts appears in the Record beginning at page 60.

at the Wheeling office. Appellant had eight manufacturing plants situated in Wheeling, Benwood, Follansbee and Beech Bottom, West Virginia, and in Steubenville, Yorkville, Martins Ferry and Portsmouth, Ohio. Sales offices were maintained in Atlanta, Georgia; Buffalo, New York; Cincinnati, Ohio; Detroit, Michigan; New Orleans, Louisiana; Philadelphia, Pennsylvania; San Francisco, California; Boston, Massachusetts, Chicago, Illinois; Dallas, Texas; Los Angeles, California; St. Louis, Missouri; Seattle, Washington, and New York City.

Orders for steel and steel products were solicited and received at the sales offices subject to acceptance or rejection at the Wheeling office and all orders received at the sales offices were forwarded to the Wheeling office for that purpose. Credit was extended to purchasers and the terms thereof fixed only at the Wheeling office where all promissory notes and accounts receivable resulting from sales were payable, and where the records of the accounts and the notes themselves were kept. All accounts were billed from the Wheeling office and the sales offices had no powers or duties with respect to their collection. Proceeds of all receivables, when and as paid, were in the custody of appellant's treasurer at Wheeling and were there applied to the general purposes of the business.

Appellant filed a personal property tax return (R. 37-57) for 1942 with the Department of Taxation of Ohio and listed in the return the machinery and equipment of its Ohio plants, its stocks of finished and semi-finished products, inventories of raw materials, supplies and other tangible personal property situated in Ohio on

January 1, 1942 (R. 52). The only intangible property shown in the return (R. 43) as having a situs in Ohio for purposes of taxation were certain deposits which were maintained in Ohio banks and which were used to meet the payrolls of the Ohio plants. All notes and accounts receivable were shown in the return (R. 43) as having a situs for taxation outside of Ohio.

Upon examination of appellant's records at the Wheeling office, the Commissioner ordered the assessment for taxation in Ohio of $5,250,525 out of a total of approximately $9,300,000 in notes and accounts receivable appearing on appellant's books on January 1, 1942 (R., 43) for the specific reason that they "resulted from the sale of products shipped from appellant's manufacturing plants in Ohio".

Some of the receivables so assessed for property taxation in Ohio resulted from sales of products out of inventory; the greater part, however, resulted from sales of products manufactured after receipt of specific orders for them. Some of the orders from which the receivables eventuated were sent directly by the customers to the Wheeling office and were there accepted, but most of the orders were received at the various sales offices and were forwarded to Wheeling for acceptance.

Property taxes on all of its receivables were paid by appellant to the state of West Virginia for the year 1942.

SPECIFICATION OF ERRORS

Appellant intends to urge as grounds for reversal of the judgment of the Supreme Court of Ohio, all of the errors in the record, proceedings, decision and final judgment of the Supreme Court of Ohio specified in the Assignment of Errors filed with the Clerk of the Supreme

Court of the United States on November 2, 1948, to-wit (R. 2, 3):

"1. The Court erred in holding and deciding that, as applied, Sections 5328-1 and 5328-2, General Code, are not in conflict with Article I, Section 8 of the Constitution of the United States. The Court should have held and decided that the statutes, as applied, are invalid in that they subject to taxation in Ohio receipts from interstate activities carried on outside of Ohio, thus subjecting the property to the risk of a double tax burden to which intrastate commerce is not exposed and thereby burdening and obstructing interstate commerce.

2. The Court erred in holding and deciding that, as applied, Sections 5328-1 and 5328-2, General Code, are not in conflict with the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Court should have held and decided that the statutes, as applied, are invalid in that they require the assessment of a property tax against intangible property which was not within the jurisdiction of the state of Ohio, thereby depriving appellant of its property without due process of law.

3. The Court erred in holding and deciding that, as applied, Sections 5328-1 and 5328-2, General Code, are not in conflict with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The Court should have held and decided that the statutes, as applied, are invalid in that they require the imposition of a property tax against the intangible property of appellant, a nonresident, but exempt identical property of a resident from taxation in Ohio, thereby denying appellant equal protection of the laws of Ohio."

SUMMARY OF ARGUMENT

The state of Ohio lacks jurisdiction to impose a property tax upon notes and accounts receivable of a foreign corporation in the absence of evidence (lacking in this

case) that the receivables are an integral part of some local business and that, as a consequence, benefits or protection are conferred upon the receivables, or upon their owner with respect to them, for which the state is entitled to ask return.

Wheeling Steel Corporation vs. Fox, 298 U. S. 193;
First Bank Stock Corp. vs. Minnesota, 301 U. S. 234;
Newark Fire Insurance Co. vs. Board of Tax Appeals, 307 U. S. 313;
Beidler vs. South Carolina, 282 U. S. 1;
Curry vs. McCanless, 307 U. S., 357;
Tax Commission vs. Aldrich, 316 U. S. 174;
Wisconsin vs. J. C. Penney Co., 311 U. S. 435.

A state property tax on the proceeds of sales in interstate commerce, such as the tax here involved, which can be duplicated by two other states and in substantial part a third time, and has already been laid by two states, unduly burdens interstate commerce.

Western Live Stock vs. Bureau of Revenue, 303 U. S. 250;
J. D. Adams Mfg. Co. vs. Storen, 304 U. S. 307;
Gwin, White & Prince vs. Henneford, 305 U. S. 434;
Freeman vs. Hewit, 329 U. S. 249;
Memphis Natural Gas Co. vs. Stone, 335 U. S. 80.

A state may not lay a property tax on intangible property of a foreign corporation authorized to do business within its borders and at the same time exempt identical property of competing domestic corporations doing business in exactly the same manner and the attempt of the state to do so constitutes a denial of the equal protection of its laws.

Hanover Fire Ins. Co. vs. Harding, 272 U. S. 494;
Hillsborough Township vs. Cromwell, 326 U. S. 620;
Concordia Fire Ins. Co. vs. Illinois, 292 U. S. 535;
Southern Railway Co. vs. Greene, 216 U. S. 400.

ARGUMENT

All notes and accounts receivable resulting from sales of products produced at appellant's Ohio manufacturing plants were assessed for taxation in Ohio. The assessment was made under Sections 5328-1 and 5328-2 [8], and the tax was levied under Section 5638 [9].

(a) Sections 5328-1 and 5328-2, as construed and applied in this case [10] are invalid under the due process clause of the Fourteenth Amendment.

There is no question that the tax assessed against appellant's receivables is an ad valorem property tax (*Ben-*

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8. All statutory references are to sections of the General Code of Ohio.

9. "Section 5638: Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the classified tax list in the offices of the county auditors and duplicates thereof in the offices of the county treasurers at the following rates, to wit:

Investments, five per centum of income yield or of income as provided by Section 5372-2 of the General Code; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; and moneys, credits and all other taxable intangibles so listed, three mills on the dollar, * * *."

The word "credits", as used in the foregoing statute is defined in Section 5327 as follows:

"Section 5327: The term 'credits' as so used, means the excess of the sum of all current accounts receivable and prepaid items [used] in business when added together estimating every such account and item at its true value in money, over and above the sum of current accounts payable of the business, other than taxes and assessments. * * *"

10. See Note, "Taxability of Open Accounts—Situs and the Fourteenth Amendment," 17 U. of Cinti. L. Rev. 61 (Jan., 1948.).

See also address of Aubrey A. Wendt, Esq., Ass't Atty Gen. of teenth Amendment," 17 U. of Cinti. L. Rev. 61 (Jan., 1948.).
Ohio, at National Tax Administrators Association Convention on the subject of "Tax Situs of Intangibles", reported in Prentice-Hall State and Local Tax Service (Ohio) par. 34,267.

tt vs. Evatt, 145 O. S. 587) and that the assessment is predicated solely upon the fact that the receivables resulted from sales of products manufactured by appellant in its Ohio plants. The basis of the assessment was stipulated by counsel for the parties, (R. 62, 63) viz.

"10. In making the aforesaid assessment, appellee determined that notes and accounts receivable in the amount of $5,250,525 owned by appellant and its subsidiaries on tax-listing day in 1942 had arisen out of business transacted by appellant in Ohio inasmuch as such notes and accounts receivable resulted from the sales of products shipped from appellant's Ohio manufacturing plants; * * *"

There is likewise no question that the receivables were created and kept outside of Ohio, and that, when paid, their avails were applied outside of Ohio to the general purposes of appellant's business. In this regard it was stipulated (R. 63, 64) that:

"12. Sales of appellant's products that gave rise to all of the notes and accounts receivable belonging to appellant and its subsidiaries on tax-listing day in 1942 resulted either (1) from orders received at the sales offices, enumerated in paragraph seven hereof, and accepted at the Wheeling office or (2) from orders received at the Wheeling office and there accepted. All orders received at the sales offices were subject to acceptance or rejection at the Wheeling office and, when so received, were forwarded by said sales offices to the Wheeling office for that purpose. Credit was extended to purchasers and the terms thereof fixed only by the Wheeling office. The selling prices of all of said products were fixed at the Wheeling office. * * *

13. All of the aforesaid notes were executed by the makers at their respective places of business and were payable at the Wheeling office to which they were forwarded by the makers upon execution

and there kept until paid. Upon payment, the avails thereof were under the control of the Treasurer of appellant and were applied indiscriminately to the general purposes of appellant's business, whether in Ohio or elsewhere. The sales offices had no powers or duties with respect to the creation, custody, collection or extinguishment of said notes.

14. All of the aforesaid accounts receivable were due within one year and were billed from and were payable at the Wheeling office. The books containing the record of said accounts receivable were kept at the Wheeling office. When paid, the avails of said accounts receivable were under the control of the Treasurer of appellant and were applied indiscriminately to the general purposes of appellant's business, whether in Ohio or elsewhere. No record of said accounts receivable were kept at the sales offices which had no powers or duties with respect to the collection thereof."

Finally, there is no evidence in the record that appellant conducted a localized business in Ohio in which the receivables were integrated, or that any officer or agent of appellant in Ohio exercised the slightest degree of control over them, or that Ohio conferred any benefit or protection upon appellant with respect to them. In this regard it is stipulated only that four of appellant's eight manufacturing plants were situated at different places in Ohio and that one of its fourteen sales offices was located at still another place in the state (R. 62).

The question raised by the attempt to tax in these circumstances was answered by this Court in *Wheeling Steel Corp. vs. Fox*, 298 U. S., 193, a case involving the identical factual set-up. In that case Chief Justice Hughes, speaking for the Court said (p. 212):

"The question here is not of the taxation of the plants in other States. The real estate, equipment and all tangible property there located is taxable by

those States respectively. The accounts receivable with which we are now concerned are the proceeds of contracts of sale. While these contracts are negotiated and orders are taken at the various sales offices throughout the country, they are subject to acceptance or rejection at the Wheeling office. All invoices are payable at Wheeling. Thus the contracts of sale become effective by the action taken at the Wheeling office and there the accounts are kept and the required payments are made. In the face of these facts, it cannot properly be said that the credits arise either where the goods are manufactured or at the sales offices where the orders are taken. The tax is not on the manufacturing or on the privilege of maintaining sales offices. The tax is not on the net profits of a unitary enterprise demanding a method, not intrinsically arbitrary, of making an apportionment among different jurisdictions with respect to the processes by which the profits are earned. Such a tax on net gains is distinct from an ad valorem property tax on the various items of property owned by the Corporation and laid according to the location of the property within the respective tax jurisdictions. Here, the tax is a property tax on the accounts receivable, as separate items of property, and these are not to be regarded as parts of the manufacturing plants where the goods sold are produced."

The facts in the *Fox Case* (298 U. S., at pp. 205-206) as to the management of appellant's business, the location of its factories and sales offices, and the manner of creation, custody and control of notes and accounts receivable resulting from sales of its products are essentially the same as the facts of the present case, and upon those facts this Court based its decision that the receivables were within the jurisdiction of the state of West Virginia for purposes of property taxation. This decision

does not, of course, foreclose the right of the state of Ohio or any other state to tax receivables belonging to appellant upon a proper showing of jurisdiction over them. No such showing was attempted here.

In the present case, the factual situation is the same as that in the *Fox Case* in every material respect. The facts showing the connection, or lack of connection, between the receivables here in question and the state of Ohio are the same as they were in the prior case. In this case, as in the *Fox Case*, appellant owned and operated factories in Ohio, the products of which were sold in West Virginia. One sales office was maintained in Ohio at which orders were taken and forwarded to West Virginia for acceptance or rejection. These are the only facts connecting the state of Ohio with the receivables which it seeks to tax as property situated within its borders, and the only reason advanced by the state for assessing them is that they arose from sales of goods manufactured in Ohio.

In short, the record shows that the notes and accounts here involved are no more localized in Ohio than were those in question in the *Fox Case* and that, as stated in that case (298 U. S. 193, 212):

> "* * * the tax is a property tax on accounts receivables, as separate items of property, and these are not to be regarded as parts of the manufacturing plants where the goods sold are produced."

Although this Court has recognized repeatedly that choses in action may acquire a situs for property taxation apart from the domicile of their owner if they become integral parts of some local business (*First Bank Stock Corp. vs. Minnesota*, 301 U. S. 234; *Wheeling Steel*

Co., p. vs. Fox, 298 U. S. 193), whether or not such integration exists is a matter of proof. Referring to the foregoing cases and to a number of earlier ones, it is said in the opinion announced by Mr. Justice Reed in the case of *Newark Fire Insurance Co. vs. Board of Tax Appeals*, 307 U. S. 313, 319-320 that:

> "Where consideration has been given to the existence of a business situs of intangibles for taxation by a state other than the state of domicile, there has been definite evidence that the intangibles were integral parts of the business conducted. In so far as the conclusion as to the existence of a business situs for the purpose of taxation, distinct from the domiciliary situs, is the basis for a claim of a federal right, the duty of inquiring into the evidence which establishes such business situs rests upon this Court."

To the same effect is the statement made in the opinion of the Court in the case of *Beidler vs. South Carolina*, 282 U. S. 1, 8 that:

> "* * * a conclusion that debts have thus acquired a business situs must have evidence to support it, and it is our province to inquire whether there is such evidence when the inquiry is essential to the enforcement of a right suitably asserted under the Federal Constitution."

In the present case the requisite proof that appellant conducted a localized business in Ohio in which the receivables in question were integrated is completely lacking. Manufacturing operations were carried on in Ohio and sales offices were maintained in twelve states, including Ohio, but there is no evidence of local control of any part of the business, whether manufacturing or selling, in Ohio or in any of the states in which sales offices were maintained. The management of the busi-

ness was centralized in Wheeling and there the receivables in question were created and kept and their avails applied to the general purposes of the business.

The concept of a business situs of intangible property apart from the domicile of the owner is a means of affording a non-domiciliary state the opportunity to make an exaction for benefits or protection conferred upon the property or upon the owner with respect to his property (*Curry vs. McCanless*, 307 U. S. 367-368), but as pointed out by Mr. Justice Frankfurter in his concurring opinion in the case of *Tax Commissioner vs. Aldrich*, 316 U. S. 174, 183:

> "When a State gives nothing in return for exacting a tax, it may be said that there is no 'jurisdiction to tax'."

In the opinion of the Court in the case of *Wisconsin vs. J. C. Penney Co.*, 311 U. S. 435, it is said (p. 444) that:

> "Taxable event," "jurisdiction to tax," "business situs," "extraterritoriality," are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

In the instant case, Ohio has conferred no benefits or protection upon appellant with respect to the receivables in question for which it is entitled to ask return. The

record shows that the receivables were created by action taken at appellant's principal office in Wheeling, West Virginia, where they were payable and where the records of the accounts and the notes themselves were kept until paid. There is no evidence that any officer or agent of appellant in Ohio had or exercised the slightest degree of control over them. For their protection, appellant paid property taxes on them to the state of West Virginia.

It is true, of course, that the receivables resulted from sales of goods manufactured in Ohio, but the factories in which they were made, and all the machinery and equipment of the factories, as well as raw materials, finished goods and other property (R. 43) were subject to Ohio's property tax laws.[11] In addition, appellant was subject to the Ohio franchise tax, which includes in its measure the value of all property owned, and business done in Ohio.[12]

Appellant contends, therefore, that Ohio gave nothing for which it is entitled to tax the receivables in question and that the attempt of the state to do so constitutes a denial of due process.

(b) **The statutes in question are also invalid under the Commerce Clause.**

In the concurring opinion of Mr. Justice Rutledge in *International Harvester Co. vs. Dept. of Treasury*, 322 U. S. 240, 353, it is pointed out that:

> "'Due process' and 'commerce clause' conceptions are not always sharply separable in dealing with these problems. To some extent they overlap.

11. Section 5625-3, General Code.
12. Sections 5495, 5497, 5498, 5499, General Code.

> If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the states becomes 'undue'. But, though overlapping, the two conceptions are not identical. There may be more than sufficient factual connections, with economic and legal effects, between the transaction and the taxing state to sustain the tax as against due process objections. Yet it may fall because of its burdening effect upon the commerce."

In the present case the "due process objection" is this: the fact that factories are located in Ohio is not sufficient, of itself, to confer jurisdiction upon the state to lay a property tax against all receivables resulting from sales of goods made in those factories. But that is not the only objection. The attempted exaction also offends the Commerce Clause. It offends the Commerce Clause because it can be duplicated to the fullest extent by two states (Delaware and West Virginia) and in substantial part a third time.

That the sales giving rise to the receivables sought to be taxed were sales in interstate commerce is not questioned. The receivables which Ohio has assessed for taxation are the proceeds of contracts of sale entered into in West Virginia. Some of the receivables resulted from orders taken at the sales offices subject to acceptance at Wheeling and some from orders sent directly to Wheeling by the purchasers; but all of the orders were in fact accepted at appellant's principal office in Wheeling where they ripened into contracts of sale. Shipments of the goods sold were made from appellant's four factories in Ohio, where the greater part of the goods, in dollar value, had been manufactured after receipt of specific orders

for them and only the lesser parts had been manufactured and kept on hand to fill orders.

It is settled that all of appellant's receivables are subject to property taxation in Delaware, appellant's legal domicile (*Cream of Wheat Co. vs. Grand Forks*, 253 U. S. 325) and in West Virginia, its commercial domicile (*Wheeling Steel Corp. vs. Fox*, 298 U. S. 193), and it is stipulated (R. 65) that property taxes on all of them were paid to the state of West Virginia for the year 1942.

Thus, if Ohio is permitted to tax, appellant will be exposed to identical exactions from three directions simultaneously. And if Ohio has authority to tax, no reason appears why the states wherein orders originate should not have similar authority. Ohio's only factual connection with these receivables is that appellant has factories therein from which goods are delivered against sales made in West Virginia. But other states have similar minimal factual connections. Appellant has sales offices in eleven states other than Ohio, namely, Massachusetts, New York, Pennsylvania, Georgia, Illinois, Michigan, Louisiana, Missouri, Texas, California and Washington. Orders are taken in all of these states and sent for acceptance or rejection to West Virginia. Without these orders there would be no receivables to tax. In other words, the origination of orders, the acceptance of orders and the delivery of the products sold were all equally indispensible to the creation of the accounts receivable. Accordingly, if Ohio, from which orders were filled, may tax, so also, it seems plain, may Massachusetts, New York, Pennsylvania, Georgia, Illinois, Michigan, Louisiana, Missouri, Texas, California and Washington, from which orders were received.

This means that all of appellant's receivables resulting from sales of goods manufactured in Ohio, which on January 1, 1942 amounted to $5,250,525 out of a total of $9,311,500 (R. 43), could be taxed as property in Delaware, West Virginia and Ohio, and such of the same receivables as eventuated from orders received at a sales office located in a state other than Ohio or West Virginia could be taxed for a fourth time in that state. Thus the Ohio tax can be duplicated to the fullest extent by two states and in substantial part by a third. That this duplication is not a mere possibility is indicated by the fact that two states, Ohio and West Virginia, have already assessed the property for taxation.

The doctrine that a state may not impose a cumulative burden on commerce (*Western Live Stock vs. Bureau of Revenue*, 303 U. S. 250; *J. D. Adams Mfg. Co. vs. Storen*, 304 U. S. 307; *Gwin, White & Prince vs. Henneford*, 305 U. S. 434) fully applies here. If the Ohio tax is lawful, four states may tax the proceeds of the same interstate transactions, two having already done so. As pointed out in the opinion of the Court announced by Mr. Justice Frankfurter in the case of *Freeman vs. Hewit*, 329 U. S. 249, 256:

> "If another State has taxed the same transaction, the burdensome consequences to interstate trade are undeniable."

(c) The statutes in question are invalid under the equal protection clause of the Fourteenth Amendment.

The statutory provisions which, as construed and applied, lay the tax here complained of, while at the same time exemyting domestic corporations in precisely the

same circumstances, are printed below. The meaning and effect of these statutes were at issue in *Ransom & Randolph vs. Evatt*, 142 O. S. 398 (1944). The decision in that case, when taken in conjunction with the decision in this case, lays bare the discrimination against foreign corporations and in favor of their domestic competitors which deprives appellant of the equal protection of the laws.

Section 5328-1: * * * Property of the kinds and classes mentioned in Section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, * * * shall be subject to taxation; and all such property of persons residing in this state used in, and arising out of business transacted outside of this state by, for or on behalf of such persons * * * shall not be subject to taxation * * *.

Section 5328-2: Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state.

* * * * * *

The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state, shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property to a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. * * *

Section 5325-1: * * * Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be "used" when they or the avails thereof are being applied in the conduct of the business, whether in this state or elsewhere. * * *

In the *Ransom & Randolph* case the court decided that Section 5328-2 fixes the tax situs of accounts receivable [13] and that the receivables of an Ohio resident are exempt from property taxes in Ohio when (a) arising out of business transacted in another state and (b) used in business, whether in the foreign state or elsewhere. In other words, a resident's receivables need not *be used in* business in a foreign state to qualify for tax exemption: all that is necessary is that the receivables arise out of business in the foreign state and be used in business anywhere. Specifically, the Court said in its opinion (p. 408) that:

> "The only statutory conditions for out of state situs of accounts receivable are that they shall be used in business and shall result from sale of property sold by an agent having office in such other state or from a stock of goods maintained therein."

In the present case, the Board decided (R. 70, 71, 72) that the accounts receivable of a non-resident are taxable

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13. The second paragraph of the syllabus in Ransom & Randolph Co. vs. Evatt reads as follows:

"2. Section 5328-2, General Code, fixes the business situs of accounts receivable. When such receivables are used in business and result from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, such receivables shall be considered, for the purpose of taxation, to have arisen out of business transacted in a state other than that in which the owner thereof resides. The provisions of such section are to be reciprocally applied to the end that all accounts receivable having a business situs in this state shall be taxed in Ohio and no such property belonging to a resident of this state and having a business situs outside of this state shall be taxed in Ohio."

(The syllabus of a decision of the Supreme Court of Ohio is prepared by the judge assigned to write the opinion, and receives the assent of a majority of the court. It is the rule, therefore, that the syllabus states the law with reference to the facts upon which it is predicated. The Baltimore & Ohio Railway Company vs. Baillie, et al., 112 O. S. 567, 570.)

in Ohio when (a) arising out of business transacted in Ohio and (b) used in business anywhere, and the Court affirmed the Board's decision (R. 22).

Thus the "business situs" of accounts receivable is determined solely by the place where they "arise out of business" as defined by Section 5328-2 which, as construed and applied, means one thing in the case of a foreign corporation, another thing entirely in the case of a domestic corporation. Specifically, in the case of an Ohio resident *no significance is attached to what is done in Ohio.* The fact that a stock of goods is maintained in Ohio is immaterial if the goods are sold by an agent having an office in another state. Receivables resulting from the sales are exempt from taxation in Ohio because of what is done outside of the state and what is done in Ohio is disregarded. Likewise, it is immaterial that sales are made by an agent having an office in Ohio if the sales are made from a stock of goods outside of the state. The fact that the stock of goods, from which the sales are made, is outside of Ohio is controlling and receivables resulting from the sales are exempt from taxation in Ohio notwithstanding that the sales are made in the state. In the case of a non-resident, however, *only what is done in Ohio is material.* The fact that sales are made by an agent having an office in another state is of no significance if the sales are made from a stock of goods in Ohio. Receivables resulting from the sales are taxable in Ohio because the sales are made there and the fact that the stock of goods is located in another state is of no consequence. So also, where sales are made by an agent having an office in another state from a stock of goods maintained in Ohio, receivables resulting from the sales are taxable in Ohio because of the location of the stock

of goods in the state. The fact that the sales are made outside of Ohio is immaterial.

In other words, Sections 5328-1 and 5328-2 require that accounts receivable of a resident, when and wherever used in business, be exempted from taxation in Ohio:

(a) if resulting from the sale of property sold by an agent having an office in a state other than Ohio, or

(b) if resulting from the sale of property from a stock of goods maintained in a state other than Ohio;

and (2) that accounts receivable of a non-resident, when and wherever used in business, be taxed in Ohio:

(a) if resulting from the sale of property sold by an agent having an office in Ohio, or

(b) if resulting from the sale of property from a stock of goods maintained in Ohio.

So construed, a resident of Ohio may maintain a stock of goods in Ohio and sell them through an agent having an office in another state, or he may maintain the stock of goods in another state and sell them through an agent having an office in Ohio and in either case all receivables resulting from the sales are exempted from taxation in Ohio by Sections 5328-1 and 5328-2. On the other hand, if a non-resident does business in exactly the same manner as the resident, maintaining a stock of goods in Ohio and selling the goods through an agent having an office in another state, or maintaining the stock of goods in another state and selling them through an agent having an office in Ohio, then, in either case, all of the receivables resulting from the non-resident's sales are taxable in Ohio under Sections 5328-1 and 5328-2. These instances are not unique as it is ordinary practice for businesses to have a stock of goods in one state and to sell

them in another at a sales office maintained for that purpose. Thus, accounts receivable arising out of one business are taxed in Ohio because the owner is a non-resident, while receivables arising out of a competing business, conducted in exactly the same manner as the other, are exempted from taxation in Ohio because the owner is a resident of the state.

Pursuant to this construction of the statutes, all of appellant's receivables resulting from sales of steel and steel products manufactured in its Ohio plants were assessed for taxation in Ohio on the ground that they resulted from the sale of property from a stock of goods maintained in Ohio (R. 22, 58, 72). Appellant vigorously opposed this conclusion in view of the stipulation (R. 63) that:

> "11. Products shipped from appellant's Ohio manufacturing plants to fill the orders from which resulted the greater part, in dollar value, of the notes and accounts receivable owned by appellant and its subsidiaries on tax-listing day in 1942 were manufactured at said plants after receipt of, and to fill specific orders therefor and had not been ma. ufactured prior to the receipt of orders and kept on hand to fill orders. A smaller part, in dollar value, of said notes and accounts receivable resulted from sales of products which had been manufactured prior to the receipt of orders therefor and kept on hand at said plants to fill any orders therefor that appellant might receive."

Assuming, however, that appellant did maintain a stock of goods in Ohio, it nevertheless sold the goods by taking orders for them at sales offices in eleven states outside of Ohio subject to acceptance at its principal office in Wheeling, West Virginia where all of the sales were concluded. Therefore, had appellant been an Ohio corporation, all of the receivables in question would have

been exempted from taxation in Ohio by Section 5328-2 on the ground that they resulted from sales of property sold by an agent having an office in another state.

This is the discrimination of which appellant complains. Its receivables were assessed for taxation only because it is a foreign corporation. Receivables of competing domestic corporations doing business in exactly the same manner as appellant are not subject to taxation in Ohio. Thus appellant's receivables are subject to taxation in Ohio while identical property of local enterprises is exempt from taxation.

The tax imposed upon appellant's receivables was levied under Section 5638, of which the pertinent provisions are the following:

> "Section 5638: Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the classified tax list in the offices of the county auditors and duplicates thereof in the offices of the county treasurers at the following rates, to-wit:
>
> * * * moneys, credits and all other taxable intangibles so listed, three mills on the dollar, * * *."

The word, "credits", as used in the foregoing statute is defined in Section 5327 as follows:

> "Section 5327: The term 'credits' as so used, means the excess of the sum of all current accounts receivable and prepaid items [used] in business when added together estimating every such account and item at its true value in money, over and above the sum of current accounts payable of the business, other than taxes and assessments. * * *."

The tax imposed by Section 5638 is an ad valorem tax (*Bennett vs. Evatt*, 145 O. S. 587). It is not an exaction for the privilege of doing business in Ohio. Ohio

levies a franchise tax [14] for that privilege and appellant was subject to that tax. Similar property of competing domestic corporations is not otherwise taxed. Under the circumstances, appellant is entitled to equality of treatment with domestic corporations of its same class.

In the case of *Hanover Fire Insurance Co. vs. Harding*, 272 U. S. 494, it is said in the opinion of the Court (510) that:

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the 14th Amendment, a line has to be drawn upon the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the 14th Amendment; but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind."

To the same effect is the following language appearing in the opinion of the Court in the case of *Hillsborough Township vs. Cromwell*, 326 U. S., 620, at page 623:

> "The equal protection clause of the 14th Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is to equal treatment."

14. Sections 5495, 5498, 5499, General Code. See Appendix.

It is respectfully submitted that Sections 5328-1 and 5328-2, as construed and applied in this case, select appellant for discriminatory treatment by subjecting its property to ad valorem taxation while exempting identical property of domestic corporations of the same class from taxation and that the statutes, therefore, deny appellant the equal protection of the laws of Ohio. *Concordia Fire Insurance Co. vs. Illinois,* 292 U. S. 535; *Southern Railway Co. vs. Greene,* 216 U. S. 400.

CONCLUSION

The tax in issue has all of the vices of which the tax approved in *Memphis Natural Gas Co. vs. Stone,* 335 U. S. 80, was said to be free.

First: There is no factual connection between the state and the property sufficient to support the tax. The record is barren of evidence that the receivables were an integral part of a business localized in Ohio. The receivables are separate items of property and are not to be considered as parts of the factories where the goods sold were made or of the sales offices where purchase orders were taken. Benefits and protection conferred by the state in respect of the factories and other real and personal property situated in Ohio were paid for by property taxes and the opportunities and advantages afforded the business as a whole were paid for by the franchise tax. There is no evidence in the record of benefits or protection conferred by the state with respect to the receivables as such. Therefore the assessment of the tax constitutes a denial of due process.

Second: The receivables are the proceeds of transactions entered into beyond the borders of the state. They are taxable as property in Delaware, the legal dom-

icile of their owner, and in West Virginia, its commercial domicile. If the Ohio tax is lawful, the same tax can be levied against a substantial part of the property by a fourth state. The Ohio tax, therefore, imposes a cumulative burden on interstate commerce and is invalid under the Commerce Clause.

Third: The receivables are taxable in Ohio because they belong to a non-resident. If they belonged to a resident they would be exempt from taxation. The tax is a property tax and not a charge imposed upon foreign corporations for the privilege of doing business in Ohio, and similar property of residents is not otherwise taxed. The assessment, therefore, selects appellant for discriminatory treatment and denies it the equal protection of the laws.

Respectfully submitted,

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APPENDIX

Statutes

Situs of Receivables

Section 5328-1: * * * Property of the kinds and classes mentioned in Section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, * * * shall be subject to taxation; and all such property of persons residing in this state used in, and arising out of business transacted outside of this state by, for or on behalf of such persons * * * shall not be subject to taxation * * *.

Section 5328-2: Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state.

* * * * * * * * * * *

The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property to a per-

son residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. * * *

Section 5325-1: * * * Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be "used" when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. * * *

Tax on Receivables

Section 5638 [15]: Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the classified tax list in the offices of the county auditors and duplicates thereof in the offices of the county treasurers at the following rates, to wit:

* * *; moneys, credits and all other taxable intangibles so listed, three mills on the dollar, * * *.

Section 5327: The term "credits" as so used, means the excess of the sum of all current accounts receivable and prepaid items [used] in business when added together estimating every such account and item at its true value in money, over and above the sum of current accounts payable of business, other than taxes and assessments. * * *

Tax on Real and Tangible Personal Property [16]

Section 5625-3: The taxing authority of each subdivision is hereby authorized to levy taxes annually, sub-

15. Taxes are levied on the same kinds and classes of intangible property on the classified tax list of the State Auditor by Section 5638-1, General Code.

16. Other levies are authorized by Sections 5625-6 et seq., General Code.

ject to the limitation and restrictions of this act [G. C. Sec. 5625-1 to 5625-39], on the real and personal property within the subdivision for the purpose of paying the current operating expenses of the subdivision and the acquisition or construction of permanent improvements. * * *.

Franchise Tax

Section 5495: The tax provided by this act for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state, except as provided herein, for the privilege of exercising its franchise during the calendar year in which such fee is payable and the tax provided by this act for foreign corporations shall be the fee charged against each corporation organized for profit under the laws of any state or country other than Ohio, except as provided herein, for the privilege of doing business in this state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable.

Section 5498: After the filing of the annual corporation report the tax commission, if it shall find such report to be correct, shall on or before the first Monday in May determine the value of the issued and outstanding shares of stock of every corporation required to file such report. Such determination shall be made as of the date shown by the report to have been the beginning of the then current annual accounting period of such corporation. For the purpose of this act, the value of the issued and outstanding shares of stock of any such corporation

shall be deemed to be the total value, as shown by the books of the company of its capital, surplus, whether earned or unearned, undivided profits, and reserves, but exclusive of (a) proper and reasonable reserves for depreciation, and depletion as determined by the tax commission, (b) taxes due and payable during the year for which such report was made, (c) the item of good will as set up in the annual report of the corporation when said annual report is accompanied by certified balance sheet showing such item of good will carried as an asset on the books of the company, (such balance sheet shall not be deemed a part of the public records, but shall be a confidential report for use of the commission only) and (d) such further amount as upon satisfactory proof furnished by the corporation, the tax commission may find to represent the amount, if any, by which the value of the assets (other than good will) of the corporation as carried on its books exceeds the fair value thereof. Claim for the deduction of such difference must be made by the corporation at the time of filing its report. The commission shall then determine as follows the base upon which the fee provided for in section 5499 of the General Code shall be computed. Divide into two equal parts the value as above determined by the issued and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wheresoever situated in each case eliminating any item of good will; take the other part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date

of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year wherever transacted. * * *.

Section 5499: On or before June 15th the auditor of state shall charge for collection from each such corporation a fee of one-tenth of one per cent. upon such value so certified and shall immediately certify the same to the treasurer of state, * * *.